AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST, VOLUME 29 (2003) (REVISED)

[Note: Entries for Pictsweet Mushrooms Farms, 29 ALRB No. 1 have been deleted from the version of this supplement published earlier, as that decision has been vacated pursuant to Admin. Order No. 2004-1.]

104.01 As an administrative agency, the ALRB does not have the authority to declare a statute unconstitutional (Art. 3, Sec. 3.5, Cal. Const.)
PICTSWEET MUSHROOM FARMS, 29 ALRB No. 3

200.01 Where necessary to determine whether a worker is an employee for purposes of ALRA coverage, the Board will apply the test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, and will consider common law right of control factors informed by the policies underlying the ALRA.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

200.01 The inquiry into whether a worker is an agricultural employee and therefore covered under the ALRA must, under some circumstances, be conducted as a two-part inquiry: 1) whether the worker is engaged in either primary or secondary agriculture, and 2) whether the worker is an employee of the employer.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

200.01 Worker who trimmed cows' hooves at a dairy did so as an employee of his father, an independent contractor, and not as an employee of the dairy; therefore, the worker was ineligible to vote in a representation election at the dairy.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

201.03 A worker who performed simple computer assisted drafting work was engaged in secondary agriculture as her work was incident to or in conjunction with the employer's farming operations.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

201.05 Truck drivers who hauled hay and feed for dairy cows were agricultural employees within the meaning of ALRA section 1140.4(b) where the drivers' employer was a farmer, and the hauling of feed was incidental to the employer's actual farming operations.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

201.05 Truck driver who hauled dairy machinery and equipment was an agricultural employee within the meaning of ALRA section 1140.4(b) where the driver's employer was a farmer, and the equipment was for use in the employer's actual farming operations.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

201.06 Worker who performed specialty work calibrating engines of vehicles used on a dairy was performing work incidental to employer dairy's farming operation and thus was an agricultural employee within the meaning of ALRA section 1140.4(b).
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

201.08 A worker who performed simple computer assisted drafting work was engaged in secondary agriculture as her work was incident to or in conjunction with the employer's farming operations.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

201.10 A crew of four men who worked on construction projects at a dairy were found to be construction workers and therefore excluded from coverage of the ALRA under section 1140.4(b). The primary work of the crew members involved specialized skills beyond building rudimentary structures, the crew leader was a former licensed general contractor, the crew was not integrated into the dairy's regular workforce, and had a unique wage scale.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

201.12 A worker whose duties included cleaning restrooms, lunchrooms and offices used by dairy employees was an agricultural employee within the meaning of ALRA section 1140.4(b) because she spent a regular and substantial amount of time performing work incidental to employer dairy's farming operation.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

204.01 Dairy employee was found to be a statutory supervisor because employee used independent judgment in performing duties even where duties could be characterized as repetitive. The employee directed daily meetings with his crew and assigned work for the day, made decisions about when to move and treat sick cows, and made decisions about when crew members were to leave for the day.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

204.03 Dairy employee was found to be a statutory supervisor because employee used independent judgment in performing duties even where duties could be characterized as repetitive. The employee directed daily meetings with his crew and assigned work for the day, made decisions about when to move and treat sick cows, and made decisions about when crew members were to leave for the day.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

204.04 Foreperson who has responsibility to assemble crew has, at least, authority to effectively recommend hiring, and is therefore a supervisor.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

204.11 Secondary indicia of supervisory status, such as differences in wages, benefits and titles, supported classifying an employee as a supervisor where the employee's rate of pay was $2.00 to $5.00 per hour more than the rest of the crew and where the employee was the only individual in the crew with the title "herdsman."
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

312.01 The Board rejected the IHE's conclusion that certain workers lacked a sufficient connection with the employer to take on the status of employees, and emphasized that if workers were agricultural employees of the employer for any time during the eligibility period, this was sufficient to make the workers eligible to vote in a representation election.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

312.01 Worker who trimmed cows' hooves at a dairy did so as an employee of his father, an independent contractor, and not as an employee of the dairy; therefore, the worker was ineligible to vote in a representation election at the dairy.
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312.06 A worker who performed simple computer assisted drafting work was engaged in secondary agriculture as her work was incident to or in conjunction with the employer's farming operations.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

323.08 In an investigative hearing to resolve challenged ballots, the burden on the party seeking to upset the status quo established by the eligibility list by challenging a voter is a burden of production rather than one of persuasion.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

414.01 Presumption that supervisor's knowledge of protected activity would become known to his superiors who made decision to discharge is rebutted where credited evidence shows that knowledge of the protected activity was not communicated to the decisionmaker.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

414.01 Individual request for re-employment not a necessary element of prima facie case where employer maintained policy whereby employees were informed of recall by their forepersons.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

415.06 Allegation that supervisor was discharged for refusing order to fire employees who had protested ill treatment by a higher level supervisor dismissed where the only testimony reflecting that such an order was given was not credited.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

417.02 Employees may rely on representation of foreperson/supervisor that they would not be recalled for work, even if supervisor was not acting on a reasonable interpretation of what she was told by higher level supervisor, and even if some employees knew that they could seek employment individually, rather than exclusively through their foreperson.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

420.15 Evidence of poor work performance and evidence that decision to discharge made prior to protected activity, as well as by strong possibility that false reasons given for failure to recall due to reluctance to discharge long time employee, sufficient to show that crew would have been discharged even in the absence of protected activity.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

421.04 The timing of the adverse action relative to the protected activity is an important circumstantial consideration. Timing alone, however, will not establish a violation.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

421.07 Presumption that supervisor's knowledge of protected activity would become known to his superiors who made decision to discharge is rebutted where credited evidence shows that knowledge of the protected activity was not communicated to the decisionmaker.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

421.10 Inference of unlawful motive raised by supervisor initially giving false reasons for failure to recall and by timing of adverse action vis-a-vis protected activity rebutted by evidence of poor work performance and evidence that decision to discharge made prior to protected activity, as well as by reasonable possibility that false reasons given for failure to recall due to reluctance to discharge long time employee.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

423.07 Concerted protest of supervisor's abusive treatment of crew is protected.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

439.13 Period of dormancy in collective bargaining activity does not cause union to lose status as certified representative under the ALRA's statutory scheme, under which union representative status can come only from certification following Board-conducted election and can only be terminated by same means, unless union disclaims interest in representing the unit or becomes defunct.
PICTSWEET MUSHROOM FARMS, 29 ALRB No. 3

451.01 Charge not untimely where, even though decision to discharge made more than six months before filing of charge, employee was given false impression that lack of recall was due to lack of work or other nonperformance factors and not told of discharge until less than six months prior to filing.
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

452.13 The standard for relief from default in California is codified in Code of Civil Procedure section 473. The pertinent portion of that provision is found in subdivision (b): "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."
ALLSTAR SEED COMPANY, 29 ALRB No. 2

452.13 It is the policy of the law to favor, wherever possible, a hearing on the merits, rather than allow a judgment by default to stand and it appears that a substantial defense could be made. But it is also true that the courts have made it clear that there are standards that must be met in order to grant such relief. Where the basis for relief from default is a mistake of law, the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law, and that excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances.
ALLSTAR SEED COMPANY, 29 ALRB No. 2

452.13 No relief from default where Respondent failed to answer complaint based on a reasonable mistake of law as to the preclusive effect of the withdrawal of a parallel charge before the NLRB because ALRB complaint served nearly three weeks after notice of NLRB withdrawal and it was not reasonable for Respondent to make no inquiry as to the significance of the complaint.
ALLSTAR SEED COMPANY, 29 ALRB No. 2

455.03 The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*P.H.Ranch,* supra.)
RIVERA VINEYARDS, ET AL., 29 ALRB No. 5

600.03 In an investigative hearing to resolve challenged ballots, the IHE properly drew adverse inferences from employer's failure to provide documentary evidence that was under its control regarding the employment status of challenged voters during the eligibility period.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

600.03 In an investigative hearing to resolve challenged ballots, the IHE properly found that declarations by the voters in question were not adequate to supplement or explain the non hearsay documentary evidence submitted regarding those voters where the voters did not testify at the hearing, and where other testimony about these voters was discredited.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

600.03 In an investigative hearing to resolve challenged ballots, the burden on the party seeking to upset the status quo established by the eligibility list by challenging a voter is a burden of production rather than one of persuasion.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

600.05 In an investigative hearing to resolve challenged ballots, the IHE properly found that declarations by the voters in question were not adequate to supplement or explain the non hearsay documentary evidence submitted regarding those voters where the voters did not testify at the hearing, and where other testimony about these voters was discredited.
ARIE DE JONG dba MILKY WAY DAIRY, 29 ALRB No. 4.

600.17 In an investigative hearing to resolve challenged ballots, the IHE properly drew adverse inferences from employer's failure to provide documentary evidence that was under its control regarding the employment status of challenged voters during the eligibility period.
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700.01 As an administrative agency, the ALRB does not have the authority to declare a statute unconstitutional (Art. 3, Sec. 3.5, Cal. Const.)
PICTSWEET MUSHROOM FARMS, 29 ALRB No. 3

700.01 As the mandatory mediation law constitutes an amendment to the ALRA, provisions of the unamended ALRA, such as section 1155.2, cannot be a basis for finding that the amendments violate the ALRA.
PICTSWEET MUSHROOM FARMS, 29 ALRB No. 3

700.01 Because the Board has no authority to declare a statute unconstitutional, Employer's argument that the mandatory mediation and conciliation law found in Labor Code sections 1164-1164.14 violates rights guaranteed under the California and United States Constitutions provides no grounds for the Board to grant Employer's petition for review.
HESS COLLECTION WINERY 29 ALRB No. 6

700.01 The Employer's argument that the mandatory mediation law found in Labor Code sections 1164-1164.14 violates section 1155.2(a) of the Labor Code is without merit. Labor Code sections 1164-1164.14 are amendments to the ALRA which took effect on January 1, 2003. The Employer cannot rely on the un-amended version of the ALRA to argue that the mandatory mediation law violates Labor Code section 1155.2(a).
HESS COLLECTION WINERY 29 ALRB No. 6

700.01 Employer's argument that the mandatory mediation and conciliation law violates sections 1119 and 1121 of the California Code of Evidence is without merit and provides no basis for the Board to grant Employer's petition for review. These Evidence Code sections pertain to confidentiality in the mediation process. Labor Code sections 1164-1164.14 create a hybrid mediation/arbitration process, and the portion of the process that is akin to arbitration is not governed by these Evidence Code sections.
HESS COLLECTION WINERY 29 ALRB No. 6

700.02 Certification naming predecessor bound successor employer for purpose of mandatory mediation law, where other statutory prerequisites were met.
PICTSWEET MUSHROOM FARMS, 29 ALRB No. 3

700.02 Period of dormancy in collective bargaining activity does not cause union to lose status as certified representative under the ALRA's statutory scheme, under which union representative status can come only from certification following Board-conducted election and can only be terminated by same means, unless union disclaims interest in representing the unit or becomes defunct.
PICTSWEET MUSHROOM FARMS, 29 ALRB No. 3

700.03 Successor employer should not be treated as "standing in shoes" of predecessors who had entered into collective bargaining agreements so as to be treated as if it had itself entered into a contract with the certified union. Successorship law does not require successors to accept predecessor collective bargaining agreements except by some form of voluntary agreement. A certified union bargaining with a successor employer is in substantially the same position as a newly certified union seeking its first contract.
PICTSWEET MUSHROOM FARMS, 29 ALRB No. 3

700.06 Employer's claim that there has been no bad faith bargaining by Hess during the prior 23 negotiation sessions with the Union is irrelevant. A finding of bad faith bargaining is not a prerequisite for the Board to order parties to the mandatory mediation process set forth in Labor Code sections 1164-1164.14.
HESS COLLECTION WINERY, 29 ALRB No. 6

701.10 Employer's argument that the mandatory mediation and conciliation law violates sections 1119 and 1121 of the California Code of Evidence is without merit and provides no basis for the Board to grant Employer's petition for review. These Evidence Code sections pertain to confidentiality in the mediation process. Labor Code sections 1164-1164.14 create a hybrid mediation/arbitration process, and the portion of the process that is akin to arbitration is not governed by these Evidence Code sections.
HESS COLLECTION WINERY, 29 ALRB No. 6

702.01 Employer who refused to participate in a mandatory mediation session ordered pursuant to Labor Code sections 1164-1164.14 waived the right to contest, in its petition for review of the mediator's report, the relevance, authenticity and accuracy of evidence offered by the Union during the session.
HESS COLLECTION WINERY, 29 ALRB No. 6

702.05 Witness's misstatement that other wine industry employees in Napa Valley were not covered by collective bargaining agreements did not result in a clearly erroneous finding of material fact warranting review of the mediator's report. The record does not indicate that the witness deliberately misled the mediator, nor did the party petitioning for review of the mediator's report explain how it was prejudiced by this misunderstanding.
HESS COLLECTION WINERY, 29 ALRB No. 6

702.05 Mediator's statement that he was imposing what amounted to a one-year contract while in reality the duration of the contract was 21 months was not a clearly erroneous finding of material fact warranting review of the mediator's report. The mediator made it clear that he established the term of the agreement by extending coverage through one full work season.
HESS COLLECTION WINERY, 29 ALRB No. 6

Note: Section 700, et al., is newly-created for mandatory mediation cases.